

MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA

v.

KHALID SHAIKH MOHAMMAD,  
WALID MUHAMMAD SALIH  
MUBARAK BIN 'ATTASH,  
RAMZI BIN AL SHAIBAH,  
AMMAR AL BALUCH (   
ALI ABDUL AZIZ ALI),  
MUSTAFA AHMED ADAM  
AL HAWSAWI

AE 31

Joint Defense Motion to Dismiss  
For Unlawful Influence

DATE FILED: 11 May 2012

1. **Timeliness:** The Military Judge established a filing deadline of 12 May 2012 for motions to be heard at the next hearing, currently scheduled for 11-15 June 2012.
2. **Relief Sought:** Through counsel, the accused in this case jointly move to dismiss all charges and specifications with prejudice based on unlawful influence. If the commission is not prepared to order the dismissal, at the very least the commission must remove death as a potential sentence.
3. **Overview:** The Military Commissions Act of 2009 (MCA) expressly prohibits "any person" from unlawfully influencing or coercing the action of a military commission, the convening authority, and the exercise of professional judgment by trial counsel or defense counsel. *See* 10 U.S.C. § 949b(a)(2). Congress included this prohibition to establish the confidence of the general public in the fairness of the proceedings. Political leadership in the United States – beginning with the Commander in Chief and appointed officials speaking on his

behalf as well as influential elected politicians - through their public comments that are both prejudicial and inflammatory, have irrevocably tainted and unlawfully influenced every aspect of this case by amassing such unmovable public hostility towards the co-accused that any objective, disinterested person would harbor a significant doubt that they can receive a fair trial by military commission.

The Commission is duty-bound to ensure that the co-accused are afforded process that will guarantee them that a death sentence will not be imposed due to the inflamed passions and prejudices that have been injected into the system by the military and political leadership of the United States. Dismissal of all charges and specifications is the only remedy that can prevent an "intolerable strain on public perception" of this military commissions system. *See United States v. Wiesen*, 56 M.J. 172, 175 (C.A.A.F. 2001).

**4. Burden and Standard of Proof:** "[The defense has the initial burden of raising the issue of unlawful command influence." *United States v. Lewis*, 63 M.J. 405, 413 (C.A.A.F. 2006); *quoting United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999); *see also United States v. Harvey*, 64 M.J. 13, 18 (C.A.A.F. 2006); *United States v. Stombaugh*, 40 M.J. 208, 213 (C.M.A. 1994). The threshold showing by the defense must be more than mere "command influence in the air" or speculation, but because of the congressional prohibition against unlawful influence contained in the MCA, and invidious impact of unlawful influence on the public perception of a fair trial, this threshold is low. *See Harvey*, 64 M.J. at 18; *quoting United States v. Johnson*, 54 M.J. 32, 34 (C.A.A.F. 2000); *Biagase*, 50 M.J. at 150. The test is "some evidence" of facts "which, if true, constitute unlawful command influence, and that the alleged unlawful command influence has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings." *Id.* (citation omitted). Once the issue of unlawful influence has

been raised, the burden shifts to the government to demonstrate *beyond a reasonable doubt* either that there was no unlawful influence or that the proceedings were untainted. *See United States v. Stoneman*, 57 M.J. 35, 41 (C.A.A.F. 2002)(emphasis added). This burden is high. *Lewis*, 63 M.J. at 413, *citing Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004), quoting *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986).

## 5. **Facts:**

### a. **Statements of Executive Branch Officials Leading up to and Following Arrests of the Accused**

On 13 November 2001, George W. Bush, while President of the United States, issued an Executive Order to establish military commissions for the purpose of trying members of al Qaeda who engaged in, aided or abetted, or conspired to commit acts of international terrorism in violation of the laws of war. *See* 66 Fed. Reg. 57833. In the period when persons, including the accused, were being captured and shipped to Guantanamo, senior administration officials made numerous conclusory statements about their status and actions.

i. Then-Secretary of Defense Rumsfeld said publicly on January 22, 2002: “We know they are terrorists, they’re the worst of the worst, they are very dangerous people who will kill people if we don’t do something.”<sup>1</sup>

ii. In an evidently coordinated political effort, the very next day then-White House Press Secretary Ari Fleischer echoed Secretary Rumsfeld’s exact words before the entire

<sup>1</sup> [http://www.defense.gov/transcripts/2002/t01222002\\_t0122sd.html](http://www.defense.gov/transcripts/2002/t01222002_t0122sd.html) (This DOD link to the transcript has been removed. Secretary Rumsfeld’s press conference of January 22, 2002 was referred to specifically, however, in Press Secretary’s press briefing the following day: <http://www.presidency.ucsb.edu/ws/index.php?pid=61624#axzz1uTJirNbs>

White House press corps, when discussing Guantanamo: "The President also understands that the people who are detained there are detained because, for the most part they're all al Qaeda, and if they were free they would engage in murder once again. These are not mere innocents. These are among the worst of the worst who are being detained because of what they have done, because of the suicidal nature of the actions that they have taken -- their willingness, their training to go out and kill and destroy and engage in suicide if they can take others with them."<sup>2</sup>

In the course of arresting the accused and of prosecuting cases before commissions, President Bush himself made a number of public speeches in which he specifically mentioned one or several of the accused in this case:

i. On 11 September 2002, Mr. bin al Shaibah was arrested and shortly thereafter transferred to the custody of the U.S. Following Mr. bin al Shaibah's arrest, on 19 September 2002, President Bush gave a speech in Washington D.C. wherein he stated: "The person who thought he'd be the 20th hijacker, Binalshibh [sic], is no longer a threat to the United States of America and our friends and allies."<sup>3</sup>

ii. On 1 March 2003, Mr. Mohammad and Mr. Hawsawi were both arrested and thereafter, they were transferred into the custody of the CIA. On the same day, the White House Press Secretary speaking on behalf of the President issued the following statement:

---

<sup>2</sup> Available at: <http://www.presidency.ucsb.edu/ws/index.php?pid=61624#axzz1uTJirNbs>

<sup>3</sup> Remarks by the President at the Republican Governors Association Fall Reception, September 19, 2002, <http://georgewbush-whitehouse.archives.gov/news/releases/2002/09/20020919-14.html>

"Khalid Shaikh Mohammad is one of Usama Bin Laden's most senior and significant lieutenants, a key Al Qaida planner and the mastermind of the September 11th attacks."<sup>4</sup>

iii. On 4 March 2003, President Bush gave a speech in Washington, D.C., to the American Medical Association wherein he stated that "American and Pakistani authorities struck a serious blow to al Qaeda by arresting Khalid Shaikh Mohammad, the top operational planner, the top killer of the al Qaeda network. The man who masterminded the September the 11th attacks..."<sup>5</sup>

iv. On 6 March 2003, President Bush held a press conference in the East Room of the White House announcing that "we captured the mastermind of the September 11th attacks against our nation. Khalid Shaikh Mohammad conceived and planned the hijackings and directed the actions of the hijackers."<sup>6</sup>

v. On 8 March 2003, in his radio address to the nation, President Bush said, "American and Pakistani authorities captured the mastermind of the September the 11th attacks against our country, Khalid Shaikh Mohammad. This is a landmark achievement in disrupting the al Qaeda network..."<sup>7</sup>

vi. On 29 April 2003, Mr. Bin 'Attash and Mr. Ali were both arrested in Karachi, Pakistan. Shortly thereafter, they were both transferred into the custody of the CIA. Following those arrests, on 30 July 2003, President Bush stated in a press conference that we are "dismantling senior management" of al Qaeda including the "key operators: Khalid Shaikh

---

<sup>4</sup> Statement by Press Secretary, "Detention of Khalid Shaikh Mohammad," March 1, 2003, <http://georgewbush-whitehouse.archives.gov/news/releases/2003/03/20030301-1.html>

<sup>5</sup> President's Remarks to American Medical Association, March 4, 2003, <http://georgewbush-whitehouse.archives.gov/news/releases/2003/03/20030304-5.html>

<sup>6</sup> President George Bush Discusses Iraq in National Press Conference, March 6, 2003, <http://georgewbush-whitehouse.archives.gov/news/releases/2003/03/20030306-8.html>

<sup>7</sup> "War on Terror," President's Radio Address, March 8, 2003, <http://georgewbush-whitehouse.archives.gov/news/releases/2003/03/print/20030308-1.html>

Mohammad, Abu Zubaydah, Ramzi -- Ramzi al Shibh [sic], or whatever the guy's name was. (Laughter.) Sorry, Ramzi, if I got it wrong. (Laughter.) Binalshibh [sic], excuse me.”<sup>8</sup>

vii. On 11 September 2003, the White House issued a press release that stated, “Pakistan has taken into custody more than 500 extremists, including al-Qaida and Taliban members. These include senior al-Qaida operational leader Khalid Shaykh Muhammad [sic], September 11 conspirator Ramzi bin al Shibh [sic], and USS Cole plotter Khallad Ba’Attash [sic].”<sup>9</sup>

viii. On 3 March 2005, President Bush gave a speech of thanks to employees of the CIA in Langley, Virginia about the “great successes” of the apprehension of Khalid Shaykh Mohammad and Ramzi bin al Shaibah, and reminded them that “it’s a matter of time before we bring these people to justice.”<sup>10</sup>

**b. Statements Surrounding the Creation of the 2006 Military Commissions Act**

On June 29, 2006, the United States Supreme Court held that the military tribunals created by the President’s Executive Order of November 13, 2001 lacked power to proceed as their structure and procedures were in violation of the Uniform Code of Military Justice and Common Article 3 of the Geneva Conventions. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 126 S.Ct. 2749 (2006). Shortly after the *Hamdan* decision was announced, the Bush Administration drafted legislation proposing the enactment of a “code of military commissions,” as an adjunct to the Uniform Code of Military Justice (UCMJ). The purpose of the legislation, the White House press release announced, was to create a permanent “system of military commissions” for the

<sup>8</sup> President Bush Discusses Top Priorities for the U.S., July 30, 2003, <http://georgewbush-whitehouse.archives.gov/news/releases/2003/07/20030730-1.html>

<sup>9</sup> Progress Report on the Global War on Terrorism, September 11, 2003, <http://georgewbush-whitehouse.archives.gov/homeland/progress/full.html>

<sup>10</sup> President Thanks CIA Employees, March 3, 2005, <http://georgewbush-whitehouse.archives.gov/news/releases/2005/03/20050303-5.html>



trial of "unlawful enemy combatants, including members of al Qaeda, the Taliban, and other international terrorists."<sup>11</sup> The President submitted the bill to Congress and while awaiting passage, which eventually occurred in October 2006, made a number of public statements to shore up support for his proposed military commissions.

i. On 15 February 2006, the White House issued a press release that stated: "More than three-quarters of al Qaeda's known leaders and associates have been detained or killed." Among others, the press release specifically named "Khalid Sheikh Mohammad [sic], mastermind of the September 11th attacks... Ramzi Binalshibh [sic], a coordinator of the September 11th attacks..."<sup>12</sup>

ii. On 6 April 2006, President Bush gave a speech in Charlotte, North Carolina, wherein he identified al Qaeda as "hid[ing] in kind of the far reaches of the world" and "good at communications... at deception...at propaganda. And they want to strike again." He went on to state: "We have done a good job of dismantling the operating structure of al Qaeda -- Khalid Shaykh Muhammad, Ramzi Binalshibh [sic] -- a series of these folks that have become the operating element of al Qaeda."<sup>13</sup>

iii. On 6 September 2006, President Bush held a press conference in the White House East Room. Also in attendance at this conference were Vice President Dick Cheney, Secretary of State Condoleezza Rice, Attorney General Alberto Gonzales, Ambassador John Negroponte, General Michael Hayden, U.S. Air Force, CIA Director, and several members

<sup>11</sup> The White, *Fact Sheet: The Administration's Legislation to Create Military Commissions*, at \*1 (Sept. 6, 2006), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-6.html>.

<sup>12</sup> Waging and Winning the War on Terror, February 15, 2006, <http://georgewbush-whitehouse.archives.gov/infocus/achievement/chap1.html>

<sup>13</sup> President Discussed Global War on Terror, April 6, 2006, <http://georgewbush-whitehouse.archives.gov/news/releases/2006/04/20060406-3.html>

of Congress. During this press conference, President Bush announced the proposed military commissions to prosecute the "terrorists." He stated:

...The terrorists who declared war on America represent no nation, they defend no territory, and they wear no uniform. They do not mass armies on borders, or flotillas of warships on the high seas. They operate in the shadows of society; they send small teams of operatives to infiltrate free nations; they live quietly among their victims; they conspire in secret, and then they strike without warning.

...In addition to the terrorists held at Guantanamo, a small number of suspected terrorist leaders and operatives captured during the war have been held and questioned outside the United States, in a separate program operated by the Central Intelligence Agency. This group includes individuals believed to be the key architects of the September the 11th attacks, and attacks on the USS Cole, an operative involved in the bombings of our embassies in Kenya and Tanzania, and individuals involved in other attacks that have taken the lives of innocent civilians across the world. These are dangerous men with unparalleled knowledge about terrorist networks and their plans for new attacks...

... As soon as Congress acts to authorize the military commissions I have proposed, the men our intelligence officials believe orchestrated the deaths of nearly 3,000 Americans on September the 11th, 2001, can face justice. (Applause.)<sup>14</sup>

iv. Following his September 6, 2006, announcement, President Bush gave a series of speeches addressing the so-called "Global War on Terror."<sup>15</sup> He began this series in Atlanta, Georgia, on September 7, 2006, where he stated: "bin Laden approved ... "the planes operation." Our intelligence agencies believe it was suggested by a fellow terrorist named Khalid Sheikh Mohammad.[sic]" Mr. Mohammad was referred to as one of al Qaeda's "most important

<sup>14</sup> President Discusses Creation of Military Commissions to Try Suspected Terrorists, September 6, 2006, <http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html>

<sup>15</sup> In a move that evinces the political atmosphere surrounding the use of the term "Global War on Terror" and this process generally, the "Global War on Terror" was relabeled "Overseas Contingency Operation," with the advent of President Obama's administration. See Scott Wilson and Al Kamen, 'Global War On Terror' Is Given New Name Bush's Phrase Is Out, Pentagon Says, Washington Post, March 29, 2009. [http://www.washingtonpost.com/wp-dyn/content/article/2009/03/24/AR2009032402818\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2009/03/24/AR2009032402818_pf.html)



leaders.” President Bush went on to urge Congress to authorize the military commissions so that “Khalid Sheikh Mohammad will receive the justice he deserves.”<sup>16</sup>

v. On 16 September 2006, in his radio address to the nation, President Bush reflected on his recent announcement that “14 suspected terrorists, including Khalid Sheikh Mohammad, the man believed to be the mastermind of the 9/11 attacks, had been transferred to Guantanamo Bay.” He again urged Congress to authorize the military commissions so that “the men our intelligence agencies believe helped orchestrate the deaths of nearly 3,000 Americans on September the 11th, 2001, can face justice.”<sup>17</sup>

vi. On 29 September 2006, President Bush gave a speech in Washington, D.C., applauding the “courageous choice” of Pakistani leader, President Musharraf, for his efforts to help capture Ramzi bin al Shibh, an “individual believed to be one of the key plotters of the 9/11 attacks...and the man our intelligence community believes masterminded the 9/11 attacks -- Khalid Sheikh Mohammad.”<sup>18</sup>

### c. Campaigning for the 2006 Mid-term Elections

The mid-term elections in the United States were held on Tuesday, 7 November 2006. All of the United States House of Representatives seats and one third of the United States Senate seats were contested in this election, as well as 36 state governorships, many state legislatures, four territorial legislatures and many state and local races.<sup>19</sup> President Bush made a number of

<sup>16</sup> President Bush Discusses Progress in the Global War on Terror, September 7, 2006, <http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060907-2.html>

<sup>17</sup> President's Radio Address, September 16, 2006, <http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060916.html>

<sup>18</sup> President Bush Discusses Global War on Terror, September 29, 2006, <http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060929-3.html>

<sup>19</sup> Available at [http://en.wikipedia.org/wiki/United\\_States\\_elections,\\_2006](http://en.wikipedia.org/wiki/United_States_elections,_2006)

appearances around the country in support of Republican candidates for various offices, and frequently used that platform to speak about the accused in this case.

i. On 2 October 2006, President Bush gave a speech in Reno, Nevada, wherein he stated that Khalid Shaikh Mohammad "is the mastermind of the September the 11th attacks."<sup>20</sup>

ii. In two speeches in California, given on October 3, 2006, President Bush reminded voters that "... almost three-quarters of the Democrats in the Senate, including both of your senators here in California, voted to stop the men and women of the CIA from continuing a program to get information from terrorists like Khalid Sheikh Mohammad about planned attacks on the United States."<sup>21</sup>

iii. Also on 4 October 2006, President Bush went on to Scottsdale, Arizona, where he discussed Senate Democrats' votes to "kill the vital [CIA] program... a program to get information from extremists and terrorists like Khalid Sheikh Mohammad [sic] about planned attacks..."<sup>22</sup>

iv. In Macon, Georgia, on October 10, 2006, President Bush explained "we have captured and interrogated a fellow named Khalid Sheikh Mohammad [sic], who our intelligence people believe was the mastermind of the September the 11th attacks." In this same

---

<sup>20</sup> Remarks by President at Heller for Congress Reception, October 2, 2006, <http://georgewbush-whitehouse.archives.gov/news/releases/2006/10/20061002-16.html>

<sup>21</sup> Remarks by President at Richard Pombo for Congress Breakfast, October 3, 2006, <http://georgewbush-whitehouse.archives.gov/news/releases/2006/10/20061003-3.html> and Remarks by President at John Doolittle for Congress Reception, October 3, 2006, <http://georgewbush-whitehouse.archives.gov/news/releases/2006/10/20061003-11.html>.

<sup>22</sup> Remarks by President at Rick Renzi for Congress Breakfast, October 4, 2006, <http://georgewbush-whitehouse.archives.gov/news/releases/2006/10/20061004-1.html>

speech, he went on to focus on the “presumed mastermind” of the September 11<sup>th</sup> attacks, emphasizing that “This country is under threat. The enemy still wants to hurt us.”<sup>23</sup>

v. On 12 October 2006, President Bush gave a speech in Chicago, Illinois wherein he stated: “...One of the people we captured was Khalid Sheikh Mohammad [sic], who our intelligence officers believe was the mastermind of the 9/11 attacks.”<sup>24</sup>

vi. President Bush signed the Military Commissions Act of 2006 (MCA) on 17 October 2006, just three weeks before the mid-term election. For the signing, President Bush held a ceremony in the White House East Room. Joining the President at the White House were: Vice President Cheney, Secretary of Defense Donald Rumsfeld, Attorney General Alberto Gonzales, General Hayden, CIA Director, General Peter Pace, U.S. Marine Corps, Chairman of the Joint Chiefs of Staff, and several Congressional leaders. In his speech during the ceremony, President Bush referred to “key terrorist leaders and operatives like Khalid Sheikh Mohammad [sic], the man believed to be the mastermind of the September the 11th, 2001 attacks...” He went on to assert that “Khalid Sheikh Mohammad [sic] and Ramzi Binalshibh [sic], [are] two of the men believed to have helped plan and facilitate the 9/11 attacks.”<sup>25</sup>

vii. Back on the mid-term election campaign trail, President Bush gave a speech in Washington, D.C., on October 20, 2006, and discussed the CIA program as it related to “Khalid Sheikh Mohammad [sic], the person our intelligence officials think is responsible for the killings on September the 11th -- the mastermind.”<sup>26</sup>

<sup>23</sup> Remarks by President at Mac Collins for Congress Reception, October 10, 2006, <http://georgewbush-whitehouse.archives.gov/news/releases/2006/10/20061010-9.html>

<sup>24</sup> Remarks by President at Roskam for Congress, David McSweeney for Congress 2006, and Illinois Congressional Victory Committee 2006 Reception, October 12, 2006, <http://georgewbush-whitehouse.archives.gov/news/releases/2006/10/20061012-12.html>

<sup>25</sup> President Bush Signs Military Commissions Act of 2006, October 17, 2006, <http://georgewbush-whitehouse.archives.gov/news/releases/2006/10/20061017-1.html>

<sup>26</sup> Remarks by President at National Senatorial Committee Reception, October 20, 2006, <http://georgewbush-whitehouse.archives.gov/news/releases/2006/10/20061020-1.html>

viii. President Bush continued on to Sarasota, Florida, on October 24, 2006, where he once again stated: "We captured a man named Khalid Sheikh Mohammad [sic], who our intelligence officers believe was the mastermind of the September the 11th attacks." The President went on to reference "these killers," referring to the accused in this case, as he discussed prevention of "further attack."<sup>27</sup>

ix. In Des Moines, Iowa, on October 26, 2006, President Bush again discussed the CIA "program" of gathering intelligence from "Khalid Sheikh Mohammad [sic], who our intelligence services believe was the mastermind of the attacks that killed over 3,000 of our citizens on September the 11th."<sup>28</sup>

x. On 28 October 2006, President Bush gave a speech in Sellersburg, Indiana, wherein he once again discussed "Khalid Sheikh Mohammad [sic], who our intelligence community thinks was the mastermind of the September the 11th attacks." Repeatedly in this speech the President referred to "terrorists" in relation to detention, interrogation and "bringing to justice," – clearly references to the accused and other men held at Guantanamo Bay.<sup>29</sup>

xi. Moving on to Statesboro, Georgia, on October 30, 2006, President Bush stated there: "We captured a fellow named Khalid Sheikh Mohammad. The intelligence community believes he was the man who masterminded the September the 11th attacks." As part of this portion of his speech he went on to elicit support for the CIA program of detaining

<sup>27</sup> Remarks by President at Vern Buchanan for Congress Reception, October 24, 2006, <http://georgewbush-whitehouse.archives.gov/news/releases/2006/10/20061024-2.html>

<sup>28</sup> Remarks by President at Lamberti for Congress and Iowa Victory 2006 Luncheon, October 26, 2006, <http://georgewbush-whitehouse.archives.gov/news/releases/2006/10/20061026-6.html>.

<sup>29</sup> Remarks by President at Indiana Victory 2006 Rally, October 28, 2006, <http://georgewbush-whitehouse.archives.gov/news/releases/2006/10/20061028-3.html>.

and questioning “captured terrorists”, monitoring of “terrorist communications” by the National Security Agency, “trying the terrorists,” and “questioning terrorist.”<sup>30</sup>

xii. In his home state of Texas, on October 30, 2006, President Bush spoke in Sugar Land, about the people “we picked up ... off the battlefield like Khalid Sheikh Mohammad [sic]. You might have heard of him. He was the mastermind of the 9/11 attacks... that killed nearly 3,000 people.” Immediately following those remarks, President Bush went on to elicit audience support for the CIA program of detention and questioning, “detaining terrorists,” “questioning terrorists,” and “trying terrorists.”<sup>31</sup>

xiii. The next day, October 31, 2006, President Bush gave a speech in Perry, Georgia where he talked about the people “we picked up ... off the battlefield... like Khalid Sheikh Mohammad [sic]... the mastermind of the September 11<sup>th</sup> attacks.” And again referred to Mr. Mohammad multiple times with the term “terrorist.”<sup>32</sup>

xiv. Once again, on November 2, 2006 in Billings, Montana, President Bush repeated that “we captured people off the battlefield...Khalid Sheikh Mohammad [sic]...the mastermind of the September the 11<sup>th</sup> attacks. He’s the person that organized and ordered the attacks... he might be the mastermind of another attack.” Again, the President continued on with the speech referring to Mr. Mohammad as a “terrorist” on multiple occasions.<sup>33</sup>

<sup>30</sup> Remarks by President at Georgia Victory 2006 Rally, October 30, 2006, <http://georgewbush-whitehouse.archives.gov/news/releases/2006/10/20061030-4.html>

<sup>31</sup> Remarks by the President at the Texas Victory 2006 Rally, October 30, 2006, <http://georgewbush-whitehouse.archives.gov/news/releases/2006/10/20061030-22.html>

<sup>32</sup> Remarks by President at Georgia Victory 2006 Rally, October 31, 2006, <http://georgewbush-whitehouse.archives.gov/news/releases/2006/10/20061031-11.html>

<sup>33</sup> ...Remarks by the President at the Montana Victory 2006 Rally, November 2, 2006, <http://georgewbush-whitehouse.archives.gov/news/releases/2006/11/20061102-3.html>

xv. Also on November 2, 2006, President Bush spoke in Elko, Nevada and again made the standard remarks about Khalid Shaikh Mohammad [sic], the “terrorist” and “mastermind of the September the 11<sup>th</sup> attacks.”<sup>34</sup>

xvi. In a November 3, 2006, speech in Springfield, Missouri President Bush repeated the remarks about Khalid Shaikh Mohammad [sic], “who masterminded the September 11<sup>th</sup> attacks,” asserting that “he might know of another attack.”<sup>35</sup>

xvii. Also on November 3, 2006, President Bush traveled to Joplin, Missouri where his remarks included his belief that “Khalid Sheikh Mohammad [sic]...ordered and masterminded the September the 11<sup>th</sup> attacks.”<sup>36</sup>

xviii. Once again on 3 November 2006, President Bush made similar comments in Le Mars, Iowa while discussing the capture of “Khalid Sheikh Mohammad [sic]...the mastermind of the September the 11<sup>th</sup> attacks.” He went on to speak on the importance of knowing “what these radicals and extremists are thinking” in order to protect the American public.<sup>37</sup>

xix. In Greeley, Colorado, on 4 November 2006, President Bush discussed the capture of an “enemy on the battlefield... Khalid Sheikh Mohammad [sic]... the mastermind of the September the 11<sup>th</sup> attacks.”<sup>38</sup>

<sup>34</sup> Remarks by the President at Nevada Victory Rally 2006, November 2, 2006, <http://georgewbush-whitehouse.archives.gov/news/releases/2006/11/20061102-8.html>

<sup>35</sup> Remarks by the President at Missouri Victory Rally 2006, November 3, 2006, <http://georgewbush-whitehouse.archives.gov/news/releases/2006/11/20061103-2.html>

<sup>36</sup> Remarks by the President at Missouri Victory Rally 2006, November 3, 2006, <http://georgewbush-whitehouse.archives.gov/news/releases/2006/11/20061103-2.html>

<sup>37</sup> Remarks by the President at Iowa Victory Rally 2006, November 3, 2006, <http://georgewbush-whitehouse.archives.gov/news/releases/2006/11/20061103-8.html>

<sup>38</sup> ...Remarks by the President at Colorado Victory Rally 2006, November 4, 2006, <http://georgewbush-whitehouse.archives.gov/news/releases/2006/11/20061104-1.html>



xx. On 5 November 2006, President Bush spoke in Grand Island, Nebraska and included in his remarks a "short story" about "Khalid Sheikh Mohammad [sic]...the mastermind of the September the 11<sup>th</sup> attacks."<sup>39</sup>

xxi. Continuing on to Topeka, Kansas on 5 November 2006, President Bush stated: "[w]e captured Khalid Sheikh Mohammad [sic]. Our intelligence officers believe he was the mastermind of the September the 11<sup>th</sup> attacks. My attitude is, if he knew about one attack, he might know about another attack, and we better find out why and what he knows. (Applause.)"<sup>40</sup>

xxii. On November 6, 2006, President Bush, the day before the election, gave a speech in Pensacola, Florida and once again referred to "Khalid Sheikh Mohammad [sic]... [as] the mastermind of September the 11<sup>th</sup>."<sup>41</sup>

xxiii. Finally, on November 6, 2006, President Bush wrapped up several months of cross-country speeches with an appearance in Dallas, Texas. His message was consistent: "Khalid Sheikh Mohammad [sic]" was the person who "masterminded the September the 11<sup>th</sup> attacks."<sup>42</sup>

**d. Statements leading up to the 2008 Charging of these Accused**

On February 11, 2008, charges were initially preferred against Mr. Mohammad, Mr. bin 'Attash, Mr. bin al Shaibah, Mr. Ali, and Mr. al Hawsawi. On 9 May 2008, Ms. Susan J. Crawford, the Convening Authority at the time, referred the charges for a joint, capital trial before military commission. Leading up to the referral, the President made another round of public statements specific to these accused.

<sup>39</sup> Remarks by the President at Nebraska Victory Rally 2006, November 5, 2006, <http://georgewbush-whitehouse.archives.gov/news/releases/2006/11/20061105-3.html>

<sup>40</sup> Remarks by the President at Kansas Victory Rally 2006, November 5, 2006, <http://georgewbush-whitehouse.archives.gov/news/releases/2006/11/20061105-4.html>

<sup>41</sup> Remarks by the President at Florida Victory Rally 2006, November 6, 2006, <http://georgewbush-whitehouse.archives.gov/news/releases/2006/11/20061106-4.html>

<sup>42</sup> Remarks by the President at Perry for Governor 2006 Rally, November 6, 2006, <http://georgewbush-whitehouse.archives.gov/news/releases/2006/11/20061106-6.html>

i. At the commencement address at the U.S. Coast Guard Academy in New London, Connecticut, on May 23, 2007, he referred to “9/11 mastermind Khalid Sheikh Mohammad.”<sup>43</sup>

ii. At a press conference in the White House Rose Garden, on May 24, 2007, President Bush stated: “We have had good success in the chief operating officer position of al Qaeda. Khalid Sheikh Mohammad, Ramzi al Rabium [sic]...” The President also emphasized that “it's really important that we do all we can do to bring them to justice.”<sup>44</sup>

iii. On March 19, 2008, President Bush gave a speech at the Pentagon wherein he discussed the “war on terror” and the capture of “Khalid Sheikh Mohammad, the mastermind behind the September 11<sup>th</sup> terrorist attacks.”<sup>45</sup>

**e. The Change in Administration and Improper Influence from Congress**

On January 20, 2009, Barack Obama was inaugurated as President of the United States. In one of its first actions, the Obama administration instructed military prosecutors to seek a 120-day suspension of legal proceedings and a motion requesting a continuance until 20 May 2009 was filed. On 22 January 2009, President Obama issued an executive order directing the “review and disposition of individuals detained at the Guantanamo Bay Naval Base and closure of the detention facilities.” The Executive Order also instructed that detention facilities “shall be closed as soon as practicable, and no later than 1 year from the date of this order.”

In a statement about Military Commissions on May 15, 2009, President Obama said “we will work with the congress on additional reforms that will permit commission to prosecute

---

<sup>43</sup> ...President Bush Delivers Commencement Address at United States Coast Guard Academy, May 23, 2007, <http://georgewbush-whitehouse.archives.gov/news/releases/2007/05/20070523-4.html>

<sup>44</sup> Press Conference by President, May 24, 2007, <http://georgewbush-whitehouse.archives.gov/news/releases/2007/05/20070524.html>

<sup>45</sup> President Bush Discusses Global War on Terror, March 19, 2008, <http://georgewbush-whitehouse.archives.gov/news/releases/2008/03/20080319-2.html>

terrorists effectively. . . this is the best way to protect our country.”<sup>46</sup> Also on May 15, 2009, Senator Lindsey Graham issued a press release expressing support for President Obama’s “decision to seek a further stay of military commission trials.” Senator Graham also supported the delay ordered on military commissions, stating that the President and Congress would use the time “come up with a sensible national security policy regarding terror suspects.”<sup>47</sup> On May 21, 2009, the Department of Justice issued a news release reporting that the Attorney General said: “This administration is committed to keeping the American people safe and upholding the rule of law, and by closing Guantanamo and bringing terrorists housed there to justice we will make our nation stronger and safer.”<sup>48</sup>

**f. The Political Debate Over Location of the Accused’s Trial**

Following President Obama’s review of all Guantanamo detainee cases, a debate ensued between various political factions over whether to try the five co-accused in the United States, in a federal court, or in military commissions at Guantanamo. President Obama’s administration announced its plan to try these accused in federal court in the Southern District of New York. In connection with this debate, numerous congressional leaders and administration officials made widely publicized statements regarding their views on the question, and vociferous public demonstrations ensued.<sup>49</sup>

<sup>46</sup> Statement of President Barack Obama on Military Commissions, The White House, Office of the Press Secretary, May 15, 2009. [http://www.whitehouse.gov/the\\_press\\_office/Statement-of-President-Barack-Obama-on-Military-Commissions](http://www.whitehouse.gov/the_press_office/Statement-of-President-Barack-Obama-on-Military-Commissions)

<sup>47</sup> Senator Graham Press Release, *Graham Applauds President Obama’s Decision to use military Commissions to try Terror Suspects*, May 15, 2009, available at: [http://lgraham.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord\\_id=44946857-802a-23ad-4fe7-2bac6310d6bd&Region\\_id=&Issue\\_id=](http://lgraham.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=44946857-802a-23ad-4fe7-2bac6310d6bd&Region_id=&Issue_id=)

<sup>48</sup> Department of Justice, Office of Public Affairs, *Accused East Africa Embassy Bomber Held at Guantanamo Bay to be Prosecuted in U.S. Federal Court*, May 21, 2009.

<sup>49</sup> Jane Mayer, *The Trial, Eric Holder and the battle over Khalid Sheikh Mohammed*, The New Yorker, February 15, 2010 available at: [http://www.newyorker.com/reporting/2010/02/15/100215fa\\_fact\\_mayer](http://www.newyorker.com/reporting/2010/02/15/100215fa_fact_mayer); Moderate in the Middle, *9/11 KSM Trial Protest in Foley Square* available at <http://moderateinthemiddle.wordpress.com/2009/12/05/911-ksm-trial-protest-in-foley-square/>;

Senator Lindsey Graham's voice became prominent in the public discussions. As a former active duty U.S. Air Force lawyer, Senator Graham continues to serve in the U.S. Air Force reserves, where he is assigned as an instructor at the Air Force JAG School. As a member of the Senate, moreover, "he serves on the chamber's most important committees: Appropriations... Armed Services... Budget...and Judiciary..."<sup>50</sup> Because of these official government positions, Senator Graham's position in the debates on the location of the trial became particularly noticeable.

i. In the fall of 2009, when the Senate was considering appropriations legislation, Senator Graham proposed an amendment to that legislation that prohibited the trial in U.S. federal court of anyone accused of plotting the 9/11 attacks. In anticipation of a vote on this amendment, on November 5, 2010, Senator Graham issued a press release that expressed emphatic support for military commissions over federal court trials, and referred to "self-incriminating tutorials Khalid Sheikh Mohammed and others gave to CIA."<sup>51</sup> Later on November 5th, the Senate voted down the Graham Amendment, and Senator Graham issued another press release stating: "Trying the 9/11 terrorists, such as Khalid Sheikh Mohammad, in civilian court gives them the same constitutional rights American citizens enjoy. Civilian trials will also place our own national security at risk. . . What awaits us when we bring a 9/11 conspirator like KSM into federal court? Chaos. His trial will be a zoo."<sup>52</sup>

<sup>50</sup> Senator Graham's biography is available at

<http://lgraham.senate.gov/public/index.cfm?FuseAction=aboutsensatorgraham.biography>

<sup>51</sup> Senator Graham Press Release, *Family Members of 9/11 Victims Support Graham Amendment*, November 5, 2009, available at:

[http://lgraham.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord\\_id=c56077a6-802a-23ad-4835-39c8c12c994f&Region\\_id=&Issue\\_id=](http://lgraham.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=c56077a6-802a-23ad-4835-39c8c12c994f&Region_id=&Issue_id=)

<sup>52</sup> Senator Graham Press Release, *Senate Votes Down Graham Amendment Barring 9/11 Terrorists from Federal District Court*, November 5, 2009, available at:

[http://lgraham.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord\\_id=46e97dc0-802a-23ad-4eb1-f2c55ba755bf&Region\\_id=&Issue\\_id=](http://lgraham.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=46e97dc0-802a-23ad-4eb1-f2c55ba755bf&Region_id=&Issue_id=)

ii. On November 13, 2009, the Attorney General made an announcement regarding the prosecution of the “five individuals accused of conspiring to commit the 9/11 attacks” that was widely reported in the national and international media. In the statement, he indicated “those allegedly responsible for the attacks of September 11<sup>th</sup> will finally face justice... I fully expect prosecutors to seek the death penalty against each of the alleged 9/11 conspirators... it is important that we ... hold terrorists accountable for their actions.”<sup>53</sup>

iii. On 14 November 2009, editorial by the Wall Street Journal discussed “Khalid Sheikh Mohammad and the four other al Qaeda planners of 9/11.” The piece assessed the decision by President Obama’s administration to hold the trial in New York as “political to a fault,” orchestrated to “speed up this entirely political shutdown” of the detention facility at Guantanamo Bay, and alleges that Mr. Holder exercised “fundamentally political judgment.”<sup>54</sup>

iv. Attorney General Holder testified before the Senate Judiciary Committee on November 18, 2009, and he addressed his decision to “refer Khalid Sheikh Mohammad and four others for prosecution in federal courts for their participation in the 9/11 plot.” In his testimony he stated: ...” we will also use every instrument of our national power to bring to justice those responsible for terrorist attacks against our people ... by holding these terrorists responsible for their actions, we are finally taking the ultimate steps toward justice.”<sup>55</sup> He emphasized the necessity of “holding these terrorists responsible for their actions. . .” and said “the acts KSM perpetrated are not only crimes but they are acts of war... [and] it is my intention to seek the death penalty with regard to the 9/11 plotters.” In reference to the debate over venue for the trials, the Attorney General indicated that Mr. Mohammad “will have no more of a

<sup>53</sup> Remarks of Eric Holder, November 13, 2009, available at <http://www.justice.gov/ag/speeches/2009/ag-speech-091113.html>

<sup>54</sup> *KSM Hits Manhattan – Again*, The Wall Street Journal, November 14, 2009.

<sup>55</sup> *Oversight of the U.S. Department of Justice, Hearing before the S. Comm. on the Judiciary*, 111<sup>th</sup> Cong. 28 (2009) (Statement of Honorable Eric. H. Holder, Jr., Attorney General of the United States).

platform to spew his hateful ideology in federal court than he would have had in a Military Commission.” In response to why the Administration would pursue a trial in an Article III court over a military commission when Mr. Mohammad had already attempted to plead guilty in a military commission, Mr. Holder responded “I’m not going to base a determination on where these cases ought to be brought on what a terrorist, what a murderer wants to do.”<sup>56</sup>

v. On the same day as Attorney General Holder’s testimony before the Senate Judiciary Committee, President Obama also participated in an interview on CNN, wherein he stated: “I think this notion that somehow we have to be fearful, that these terrorists are – possess some special powers that prevent us from presenting evidence against them, locking them up and, you know, exacting swift justice, I think that has been a fundamental mistake.”<sup>57</sup> President Obama further said “We have set up now a military commission system that is greatly reformed and so we can try terrorists in the forum.”<sup>58</sup>

vi. Responding to the news that the Obama Administration would move some Guantanamo detainees to Illinois, Senator Lindsey Graham. In his statement, Senator Graham referred to an “unprecedented decision to try enemy combatants captured on the battlefield in civilian courts. . . I hope the Administration hits the pause button on closing Guantanamo and works with Congress to develop a comprehensive strategy to keep dangerous terrorists off the battlefield.”<sup>59</sup>

<sup>56</sup> *Oversight of the U.S. Department of Justice, Hearing before the S. Comm. on the Judiciary*, 111<sup>th</sup> Cong. 28 (2009) (Statement of Honorable Eric. H. Holder, Jr., Attorney General of the United States).

<sup>57</sup> Josh Gerstein, *Obama on terror trials: KSM will die*, November 18, 2009, available at: <http://www.politico.com/news/stories/1109/29661.html>

<sup>58</sup> *Id.*

<sup>59</sup> Senator Graham press release, *Graham on Guantanamo*, available at: [http://lgraham.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord\\_id=941419c8-802a-23ad-48ee-09e5e4910493&Region\\_id=&Issue\\_id=](http://lgraham.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=941419c8-802a-23ad-48ee-09e5e4910493&Region_id=&Issue_id=)



vii. In January 2010 on NBC Nightly News, President Obama's Press Secretary said that "Khalid Sheikh Mohammad is going to meet justice and he's going to meet his maker. He will be brought to justice and he's likely to be executed for the heinous crimes that he committed in killing and masterminding the killing of 3,000 Americans. That you can be sure of."<sup>60</sup>

viii. On 28 January 2010, the White House Deputy Press Secretary, while onboard Air Force One, issued a statement wherein he said: "Khalid Sheikh Mohammad [sic] is a murderous thug who has admitted to crimes -- who has admitted to some of the most heinous crimes ever committed against our country. And the President is committed to seeing that he's brought to justice."<sup>61</sup>

ix. On 29 January 2010, Senator Graham issued a press release indicating he would soon be introducing "bipartisan legislation to cut off funding for the trials of the 9/11 conspirators in federal civilian court" wherein he stated:<sup>62</sup>

Khalid Sheikh Mohammad [sic] and the 9/11 conspirators should be tried by military commission -- not civilian courts where they will be given the same legal rights as American citizens. The decision to prosecute enemy combatants like Khalid Sheikh Mohammad who were captured on foreign battlefields in civilian court. . . . should not stand.

x. On 2 February 2010, Senator Graham and others announced that they introduced "bipartisan legislation to cut off funding for the trials of the 9/11 conspirators in civilian court." Senator Graham issued a press release wherein it was stated: "I believe it is

<sup>60</sup> Transcript available at [http://www.msnbc.msn.com/id/35168785/ns/us\\_news-security/t/gibbs-accused-plotter-likely-be-executed/](http://www.msnbc.msn.com/id/35168785/ns/us_news-security/t/gibbs-accused-plotter-likely-be-executed/)

<sup>61</sup> The White House, Office of the Press Secretary, *Gaggle by Deputy Press Secretary Bill Burton onboard Air Force One en route Tampa, Florida*, January 28, 2010, available at: <http://www.whitehouse.gov/the-press-office/gaggle-deputy-press-secretary-bill-burton-aboard-air-force-one-en-route-tampa-flori>

<sup>62</sup> Senator Graham press release, *Graham on the Trial of KSM and 9/11 Conspirators*, available at: [http://lgraham.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord\\_id=7afd19b5-802a-23ad-44da-faf37ealdfla&Region\\_id=&Issue\\_id=](http://lgraham.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=7afd19b5-802a-23ad-44da-faf37ealdfla&Region_id=&Issue_id=)

inappropriate to give the mastermind of the 9/11 attacks the same constitutional rights as an American citizen ... Military commissions are the proper venue for the trial of KSM and the other 9/11 conspirators. ... do we really want to give KSM the biggest microphone in the world to spread his message of hate?" Senator John McCain stated: "We should not put our citizens at risk by trying terrorists in civilian communities within the United States... Congress and the Administration created military commissions for terrorists like Khalid Sheikh Mohammad." Senator Lieberman stated:

As the Chairman of the Homeland Security and Governmental Affairs Committee, I am particularly concerned about the homeland security implications of trying Khalid Sheikh Mohammad and his alleged 9/11 co-conspirators in civilian courts in the United States. ... To do so would needlessly expose Americans to increased risks of terrorist attacks ... Trying these alleged war criminals as common criminals is justice according to Alice in Wonderland – common sense and justice turned upside down.

He went on to urge that "individuals adjudged to be enemy combatants" and "dangerous law-of-war detainees" should not be treated as "common criminal." Judiciary Committee ranking member, Senator Sessions, said, "These trials are simply too misguided, too costly, and too dangerous. We must not treat terrorism as a matter of routine law enforcement—and we must not treat terrorists like the innocent civilians they target." According to Senator Chambliss, "We should not give those terrorists the same constitutional rights granted to our citizens, and we should not give them a platform from which to spew their hatred toward America. These terrorists should not be treated any differently than those caught on the battlefield." "The Administration's decision to try the 9/11 terrorists in civilian court is beyond irresponsible.

These people are at war against the United States and our values. They deserve a military judge and jury, not a soap box and a megaphone," said Senator Barrasso.<sup>63</sup>

xi. On 12 February 2010, a Washington Post article indicated that "President Obama is planning to insert himself into the debate about where to try the accused mastermind of the Sept. 11, 2001, attacks" In a CBS interview, Obama "made it clear that. . . he is now part of the decision-making process."<sup>64</sup> According to the authors, "signaling a recognition that the administration had mishandled the process and triggered a political backlash."<sup>65</sup> Democrats, including Senate Judiciary Chairman Patrick Leahy and Senate Intelligence Chairman Dianne Feinstein backed the Administration's decision to use federal courts by saying "Our system of justice is strong enough to prosecute the people who have attacked us."<sup>66</sup>

xii. On 14 February 2010, in an interview on *Face the Nation*, Vice President Biden said he believed traditional federal courts would provide the longest sentences to terrorists, based on their track record of convictions. Of Khalid Shaikh Mohammad, Vice President Biden said, "Looking at the evidence that's been made available to me as part of, in a generic sense, the executive branch and the prosecuting team, I am absolutely convinced he will be put away for a long, long time." He went on to say "A military tribunal is available. It is the less preferable way to go. But one way or another he will be held accountable." "Our objective is to make sure they pay the highest price possible for the inhumanity they visited upon our country."<sup>67</sup>

<sup>63</sup> Senator Graham press release, *Senator Graham and Others Call for Action on Trial of KSM and 9/11 Conspirators*, available at [http://lgraham.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord\\_id=9156b7e2-802a-23ad-4c29-a2b13359e1b2&Region\\_id=&Issue\\_id=](http://lgraham.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=9156b7e2-802a-23ad-4c29-a2b13359e1b2&Region_id=&Issue_id=)

<sup>64</sup> Anne E. Kornblut and Carrie Johnson, *Obama will help select location of Khalid Sheik Mohammad terrorism trial*, The Washington Post, February 12, 2010.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> Vice President Biden, *Interview with Bob Schieffer on Face the Nation*, February 14, 2010.

xiii. On 22 February 2010 Attorney General Holder held a news conference wherein he stated: "Khalid Shaikh Mohammad, the others who are part of the – what we've come to call the 9/11 trial, others who remain at Guantanamo are thugs. They are people who engaged in criminal and warlike activities against the United States."<sup>68</sup> He also stated "We are at war against a very dangerous and intelligent and adaptable enemy, and we must use every weapon available to us in order to win that war."

xiv. On 5 March 2010 a Washington Post article reported as follows:

President Obama's advisors are nearing a recommendation that Khalid Sheik Mohammad [sic], the self-proclaimed mastermind of the Sept. 11, 2001, attacks, be prosecuted in a military tribunal . . . The president's advisors feel increasingly hemmed in by bipartisan opposition to a federal trial in New York and demands, mainly from Republicans, that Mohammad and his accused co-conspirators remain under military jurisdiction, officials said.

...Top Obama advisers have been negotiating with Sen. Lindsey O. Graham (R-S.C.) – a vocal critic of trying the Sept. 11 suspects in civilian court – in pursuit of a deal that would secure his help in closing Guantanamo.<sup>69</sup>

xv. On 31 March 2010, in an interview on MSNBC, White House Press Secretary Robert Gibbs said that Mr. Mohammad will be brought to justice "in some form or another." That he will have to "answer for his crime. And I believe he will be guilty and will have to pay the punishment for those crimes," Mr. Gibbs continued, adding that he believes that the punishment will be execution. He added that Mr. Mohammad "is a thug who can and will be brought to justice."

xvi. On 27 April 2010, The Washington Post published an article describing the importance of Senator Graham to the Obama Administration indicating he

<sup>68</sup> Transcript of News Conference of Attorney General Eric Holder, February 22, 2010.

<sup>69</sup> Anne E. Kornblut and Peter Finn, *Obama advisers set to recommend military tribunals for alleged 9/11 plotters*, The Washington Post, March 5, 2011.

is "one of only a handful of potential votes for Obama and the Democrats in a chamber in which 41 GOP lawmakers can block almost any agenda item." According to the article, Senator Graham has a "direct line" to White House Chief of Staff Rahm Emanuel, "and more than once has met with Obama to discuss detention policy." The article further states:

On terrorism, Graham has been the lead – and, for the most part, only – lawmaker from either party working with the White House to reach a comprehensive deal on closing the military prison at Guantanamo Bay, Cuba.

Graham, a former military lawyer, would like to see the facility closed, but only if the administration sets up a system for trying accused terrorists in military commission rather than in civilian courts. He vociferously opposed the decision late last year to try . . . [KSM] in federal court in lower Manhattan, saying it would be a deal-breaker for any future negotiations.<sup>70</sup>

xvii. On 4 July 2010, the Washington Post reported that "Obama administration officials said they would soon choose an alternative venue for the case that promised to secure justice for the Sept. 11, 2001 attacks." Sources said, "In an unusual twist, the matter has been taken out of the hands of the Justice Department officials who usually make prosecutorial decisions and rests entirely with the White House."<sup>71</sup>

xviii. On 15 July 2010 Senator Graham sent a letter to Attorney General Eric Holder wherein he addressed the failure of the Administration to make a decision on a trial venue for

the perpetrators of the September 11 attacks... As part of the enemy force that attacked our nation, these individuals should be

<sup>70</sup> Michael D. Shear, *Sen. Lindsey Graham has the White House's ear*, The Washington Post, April 27, 2010. <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/27/AR2010042700964.html>

<sup>71</sup> Jerry Markon, *Sept. 11 Trials Still in Search of a Venue*, The Washington Post, July 4, 2010. <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/03/AR2010070302964.html>

tried for war crimes by the recently reformed military commissions system signed into law by President Obama. They should be held accountable for their actions now. ... when it comes to those who planned the vicious September 11 attack on our nation, the use of civilian trials seriously undermines the war effort. I believe I speak for the majority of Americans and the Congress on this point.<sup>72</sup>

xix. On 4 April 2011, Attorney General Holder made a statement on the forum decision for the "prosecution of the 9/11 Conspirators" wherein he stated his goal was to

... choose the venue where we could achieve swift and sure justice most effectively for the victims of those horrendous attacks and their family members. ... we simply cannot allow a trial to be delayed any longer for the victims of the 9/11 attacks or for their family members who have waited for nearly a decade for justice. I have talked to these family members on many occasions over the last two years. Like many Americans, they differ on where the 9/11 conspirators should be prosecuted, but there is one thing on which they all agree: We must bring the conspirators to justice. So today I am referring the cases of Khalid Sheikh Mohammad, Walid Muhammad Bin Attash, Ramzi Bin Al Shibh, Ali Abdul-Aziz Ali, and Mustafa Ahmed Al Hawsawi to the Department of Defense to proceed in military commissions.<sup>73</sup>

xx. On 4 April 2011, Senator Graham released a statement applauding the decision to move the trial of "KSM and the 9/11 Conspirators" to a military commission wherein he emphasized that "Those responsible for planning and executing the attacks on 9/11 present a danger to our nation, and it is inexcusable that they have not been brought to trial... so justice can finally be rendered." He went on to refer to

<sup>72</sup> Senator Graham press release, *Graham Presses Attorney General over Trial of 9/11 Conspirators*, available at:

[http://lgraham.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord\\_id=d70598fb-802a-23ad-47c5-7e838ce09d63&Region\\_id=&Issue\\_id=](http://lgraham.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=d70598fb-802a-23ad-47c5-7e838ce09d63&Region_id=&Issue_id=)

<sup>73</sup> *Statement of the Attorney General on the Prosecution of the 9/11 Conspirators*, April 4, 2011, available at: <http://www.justice.gov/iso/opa/ag/speeches/2011/ag-speech-110404.html>



Mr. Mohammad as the “mastermind of 9/11” and applauded the fact that the “9/11 co-conspirators will be held accountable...”<sup>74</sup>

xxi. On 16 September 2011, John Brennan, President Obama’s senior advisor on counterterrorism and homeland security delivered a speech at the Harvard Law School wherein he stated:

... Obviously, the death of Usama Bin Laden marked a strategic milestone in our effort to defeat al-Qa’ida. Unfortunately, Bin Laden’s death, and the death and capture of many other al-Qa’ida leaders and operatives, does not mark the end of that terrorist organization or its efforts to attack the United States and other countries. Indeed, al-Qa’ida, its affiliates and its adherents remain the preeminent security threat to our nation.

... When we uphold the rule of law, our counterterrorism tools are more likely to withstand the scrutiny of our courts, our allies, and the American people. And when we uphold the rule of law it provides a powerful alternative to the twisted worldview offered by al-Qa’ida. Where terrorists offer injustice, disorder and destruction, the United States and its allies stand for freedom, fairness, equality, hope, and opportunity.<sup>75</sup>

## 6. Discussion:

### I. THE MCA PROHIBITS EVEN THE APPEARANCE OF UNLAWFUL INFLUENCE

Unlawful influence has been deemed the “mortal enemy,” *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986), of military justice because of the recognition that members of the military, including convening authorities, panel members, witnesses, counsel, etc., through strict discipline and adherence to a military chain of command, are more susceptible to the influence of military superiors and policies than their civilian counterparts in a civilian judicial proceeding.

<sup>74</sup> Senator Graham press release, Graham Applauds Decision to Try KSM in Military Commission, April 4, 2011, available at: [http://lgraham.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord\\_id=21ae6785-802a-23ad-429f-1100439752f7&Region\\_id=&Issue\\_id=](http://lgraham.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=21ae6785-802a-23ad-429f-1100439752f7&Region_id=&Issue_id=)

<sup>75</sup> John Brennan, *Strengthening our Security by Adhering to our Values and Laws*, Harvard Law School, September 16, 2011, available at: <http://opiniojuris.org/2011/09/16/john-brennan-speech-on-obama-administration-antiterrorism-policies-and-practices/>

The central focus of the framers of the Uniform Code of Military Justice (UCMJ) was the elimination of “any influence of command control from a court-martial.” *United States v. Goodwin*, 5 U.S.C.M.A. 647, 659 (C.M.A. 1955) (Quinn, C.J., dissenting). At the hearings before the House Armed Services Committee that led to passage of the UCMJ, the American Bar Association complained, “the instances in which commanding officers influenced courts are legion.” *Bills to Unify, Consolidate, Revise, and Codify the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice: Hearing on S. 857 and H.R. 4080 Before the Subcommittee of the Committee on Armed Services United States Senate, 81st Cong. 717-18* (1949). Through the enactment of Article 37, UCMJ, Congress sought to put an end to this practice. *Id.* at 1019. Article 37, UCMJ, prohibits, *inter alia*, any person subject to the UCMJ from attempting to “coerce or, by any unauthorized means, influence the action” of courts-martial or military tribunals. 10 U.S.C. § 837.

The MCA *broadens* the protections of Article 37, extending the scope of the prohibition to “any person” – not only those subject to the UCMJ – and prohibits attempts to coerce or influence the “exercise of professional judgment by trial counsel or defense counsel” – not just the action of court-martial or military tribunals. *See* 10 U.S.C. § 949b(a)(2)(C). There could be no stronger evidence of the seriousness with which Congress viewed the threat of unlawful influence in connection with military commission proceedings and its desire to eliminate comprehensively this “mortal enemy of military justice.” *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986). President Bush’s decision in November 2001, ratified by Congress in 2006 with the passage of the MCA, incorporated into the military commissions the shared responsibility of military commanders, military judges, and others involved in the administration

of military justice to foster “public confidence in the actual and apparent fairness of our system of justice.” *Harvey*, 64 M.J. at 17. That responsibility was reaffirmed with the passage of the 2009 MCA. “The military commission was not born of a desire to dispense a more summary form of justice than is afforded by court-martial; it developed, rather, as a tribunal of necessity to be employed when courts-martial lacked jurisdiction over either the accused or the subject matter.” *Hamdan v. Rumsfeld*, 548 U.S. 557, 624 (2006).

Military Courts have long held that the “use of command meetings to purposefully influence the members in determining a court-martial sentence violates Article 37, UCMJ.” *United States v. Baldwin*, 54 M.J. 308, 310 (C.A.A.F. 2001). The Court in *Baldwin* specifically noted a “confluence of timing and subject matter” that was troubling. *Id.* at 310. The facts before the Court demonstrated that the Commanding Officer had made comments regarding court-martial sentences being “too lenient,” that “minimum sentences should be 1 year,” and that “officers should be punished more harshly than enlisted person.” *Id.* at 310. The Court of Appeals for the Armed Forces ordered a hearing to fully develop the facts surrounding the statements and their effect on appellant’s court-martial. *Id.* at 311.

In *United States v. Gerlich*, 45 M.J. 309 (C.A.A.F. 1996), the Court of Appeals for the Armed Forces addressed the issue whether a letter from the convening authority’s superior suggesting that the convening authority set aside an Article 15 punishment in order to refer the case to court-martial resulted in unlawful command influence. *Id.*, at 312. In that case, the original convening authority testified that his superior’s letter only caused him to reexamine his position. *Id.*, at 313. The court observed that a subordinate officer is in a tenuous position when it comes to evaluating the effects of unlawful command influence being exerted on him or her. *Id.* The *Gerlich* court thus concluded that the Government did not meet its burden of proof in

dispelling at least the appearance of unlawful command influence and, because no curative action had been taken, it reversed. *Id.* at 313-14; *see also, United States v. Levite*, 25 M.J. 334 (CMA 1987).

In *United States v. Stoneman*, 57 M.J. at 41, the highest military court ruled that, even if actual unlawful influence is not shown, relief is still warranted where there is an appearance of unlawful influence. *Id.* at 42 (“disposition of an issue of unlawful command influence falls short if it fails to take into consideration the concern of Congress and this Court in eliminating even the appearance of unlawful command influence at courts-martial.”). The appearance of unlawful influence is “as devastating to the military justice system as the actual manipulation of any given trial.” *Lewis*, 63 M.J. at 406; *citing United States v. Simpson*, 58 M.J. 368, 374 (C.A.A.F. 2003). The mere appearance of unlawful influence may place an “intolerable strain on public perception of the military justice system.” *United States v. Wiesen*, 56 M.J. 172, 175 (C.A.A.F. 2001). “[T]he appearance of unlawful influence exists where an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding.” *Lewis*, 63 M.J. at 415.

These analyses and tests that apply to military courts-martial apply to the military commissions. In fact, the necessity for the military judge to “avoid even the appearance of evil in his courtroom by establishing the confidence of the general public in the fairness” of the proceedings is significantly heightened where Congress has expressly afforded detainees greater protections against unlawful influence than those that are found in the UCMJ. *Id.*; *quoting Stoneman*, 57 M.J. at 42; *see also, United States v. Rosser*, 6 M.J. 267, 271 (C.M.A. 1979). In the military commissions case of *United States v. Hamdan*, Judge Allred recognized the intent of Congress and the expanded concept of unlawful command influence. The *Hamdan* commission

ruled that "Congress had the intent to protect military commission participants from unlawful influence, and specifically from political influence, and that its purpose in doing so was to protect the integrity of the proceedings and enhance their reputation in the public view." *United States v. Salim Ahmed Hamdan*, D-026 Ruling on Motion to Dismiss (Unlawful Influence), 9 May 2008. Judge Allred went on to explain that the language of the MCA "must be construed to reflect a Congressional determination that Prosecutors in military commissions require greater protection from political pressure than trial counsel in a court-martial require."

## **II. PRETRIAL STATEMENTS BY POLITICAL AND MILITARY LEADERSHIP AND POLITICAL INTERFERENCE, UNLAWFULLY INFLUENCED THE DECISION TO CHARGE THESE ACCUSED IN THIS COMMISSION**

In June 2006, the U.S. Supreme Court rejected President Bush's first attempt at commissions and held the original (and as revised by subsequent Orders) military commissions lacked the power to proceed as the commission's structure and procedures were in violation of the Uniform Code of Military Justice and Common Article 3 of the Geneva Conventions. *See Hamdan* 126 S.Ct. 2749. Within months, President Bush lobbied the Congress and the American public in support of a bill that later was enacted as the Military Commissions Act of 2006 (MCA). Repeatedly during the late-summer, early-fall of 2006, President Bush referenced the men charged in the present case to garner public and political support for the MCA and members of his political party running in the mid-term elections.

The unlawful influence of the Bush era was amplified with the publicity that ensued during the tenure of President Obama. When President Obama came into office in 2008, one of his first actions as Commander-in-Chief was to direct a stay of proceedings in the military commissions and a review of each case by a Detainee Review Team. After completing of the review, in November 2009, the Administration announced that these accused would be tried in

U.S. Federal District Court in New York. In the days surrounding the Administration's announcement, there ensued a heated public debate over the location of the trials. The debate continued throughout 2010 and into early 2011. In these very public debates, the accused in this very case were referred to as "terrorists", "thugs", and "murderers" and accused of wanting to "spew hateful ideology" with a "soapbox and a megaphone." The common themes in the debate, ongoing for several months, were (1) ensuring "terrorists" were not given the same constitutional rights as U.S. citizens, (2) emphasizing the "dangerous" nature of these accused and these trials, and (3) "bringing to justice" the men responsible for 9/11. The themes relied upon a predetermination of guilt, and there was frequent discourse by officials at the highest levels of our military and government that "justice" equals execution of these men.

In addition to Administration officials, several U.S. Senators made public statements during the course of the debate. Senator Lindsey Graham's voice was prominent, and his influence with the White House became obvious. As an experience military attorney and with membership in several powerful congressional committees, Senator Graham was important to the Obama Administration in another important way. He was "one of only a handful of potential votes for Obama and the Democrats in a chamber in which 41 GOP lawmakers can block almost any agenda item." *Shear, Sen. Lindsey Graham has the White House's ear*, The Washington Post, April 27, 2010. A prosecutorial decision that would normally be in the hands of the Justice Department was subsumed by the executive - the White House and politics would drive the decision.



**III. WIDESPREAD, INFLAMMATORY STATEMENTS FROM POLITICAL LEADERSHIP OVER THE COURSE OF 10 YEARS HAVE SATURATED THE COMMUNITY AND GIVEN RISE TO UNLAWFUL INFLUENCE.**

When the overall tenor of statements made by senior officials contain an express or implied position on disposition or adjudication, unlawful command influence may be present. *See, United States v. Simpson*, 58 M.J. 368, 375 (C.A.A.F. 2003). The burden established in *Biagase* requires that the accused show that the “general tenor of the leadership’s interaction with the media demonstrated either the intent to improperly influence the court-martial process or the appearance of such an influence.” *Id.* at 375.

When those with the mantle of command authority deliberately orchestrate pretrial publicity with the intent to influence the results in a particular case or series of cases, the pretrial publicity itself may constitute unlawful command influence. Even the perception that pretrial publicity has been engineered to achieve a prohibited end - regardless of the intent of those generating the media attention - may lead to the appearance of unlawful command influence.

*Id.* at 374, citing *United States v. Simpson*, 55 M.J. 674, 687 (A.C.C.A. 2001).

As the Commander-in-Chief, the President of the United States sits atop the chain of command of the United States military. *See* U.S. CONST. art. II, § 2, cl.1. In November 2001, President Bush, invoking his “war powers” as authorized by Congressional Joint Resolution, made the decision that captured members of al Qaeda should stand trial before a military commission for violations of the law of war, rather than being tried before courts-martial or in U.S. federal district courts. *See Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57833; *see also*, Authorization for Use of Military Force (AUMF), 115 Stat. 224, note following 50 U.S.C. § 1541 (2000 ed. Supp. III)(Joint Resolution by Congress authorizing the President to “use all necessary and appropriate force against those

nations, organizations, or persons her determined planned, authorized, committed, or aided the terrorist attacks...in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”). By his Order, the President resurrected military commissions and provided the legal framework for such trials that concentrated all judicial power over “enemy combatants” in the hands of the Executive branch of government.

In the present case, the defense easily meets its initial burden to provide “some evidence” that the facts are both true and constitute unlawful influence. This “low threshold” is met by providing the extensive public record of statements made by two U.S. Presidents and other elected and appointed officials about these specific accused, facing these charges, in this commission. For the past 10 years, through the administrations of two Presidents, these accused have consistently been described as “thugs,” “murderers,” and “terrorists” who “planned the 9/11 attacks” and must “face justice.” It can easily be understood by members of the public that this system of military commissions exists solely for the purpose of imposing a death sentence upon these accused. According to our own Commander-in-Chief, “Khalid Sheikh Mohammad is going to meet justice and he’s going to meet his maker.”

As the former Judge Advocate General of the United States Navy, Vice Admiral MacDonald helped draft the Military Commissions Acts of 2006 and 2009; he was invited to speak on several occasions, before both chambers of Congress, in support of the legislation. In 2006, while serving as the Navy’s top lawyer, VADM MacDonald testified before Congress that he supported prosecutions by military commission and went on to explain:

Working together to carefully navigate these important issues, I am confident that we can develop a system that balances the needs of national security with the importance of affording all accused, whether terrorists or American service members, a fair and full judicial proceeding.

*The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18, Hearing before the S. Comm. on the Judiciary, 109<sup>th</sup> Cong. 8 (2006)* (Statement of Rear Admiral Bruce MacDonald, Judge Advocate General, U.S.Navy, Washington, D.C.).

In testifying about the 2009 Act, he was described in the press as the “bullish backer of the at-times controversial tribunal system.” Carol Rosenberg, *Obama appoints new chief for war court at Guantanamo*, Miami Herald, March 25, 2010. After his work as an architect of this system that was subject to such widespread political debate, retired Vice Admiral Bruce MacDonald accepted an appointment from the Secretary of Defense to become the Convening Authority of the military commissions. *See generally*, 18 U.S.C. §948h. In this role, he has exercised authority to determine that the accused must be prosecuted by military commission and that the death penalty should be sought against them. In making that determination to refer capital charges, he failed to give individualized consideration to each accused in this joint trial; he failed to take into consideration the individual treatment of each accused over the past ten years; he refused to provide discovery to the accused while his decision was pending; and, he failed to resource each accused so that each could develop a legally sufficient mitigation submission, which he himself solicited from the accused.

The ubiquitous pretrial publicity concerning this case, where comments focused on not only the trial, but the sentence to be imposed, the hyper-politicization of the forum decision, and the political appointment of retired Vice Admiral MacDonald as Convening Authority after he worked with Congress on the Act that applies to this process, creates the appearance to the objective, disinterested observer that these proceedings cannot be fair. As the initial burden is easily met, the government must be able to prove, *beyond a reasonable doubt*, that the pretrial publicity that has infected this case over a period of years has left it untainted.

**IV. DISMISSAL OF ALL CHARGES AND SPECIFICATIONS WITH PREJUDICE IS THE ONLY REMEDY THAT CAN CURE THE UNLAWFUL INFLUENCE CAUSED BY THE UNPRECEDENTED WIDESPREAD, INFLAMMATORY STATEMENTS FROM POLITICAL LEADERSHIP IN THIS CASE**

As stated above, once the issue of unlawful influence has been raised, the burden shifts to the government to demonstrate *beyond a reasonable doubt* either that there was no unlawful influence, or that the proceedings were untainted. *Stoneman*, 57 M.J. at 41. Once the government is unable to meet its burden on the present motion, the remedy to which the co-accuseds are entitled is dismissal of all charges and specifications with prejudice. *See, Lewis*, 63 M.J. at 407.

The dismissal of charges is appropriate when an accused would be prejudiced, *See United States v. Green*, 4 M.J. 203, 204 (C.M.A. 1978); *citing United States v. Gray*, 22 C.M.A. 443, 445 (1973). Dismissal with prejudice has been upheld as an appropriate remedy when a military judge has precisely identified the extent and negative impact of unlawful influence. *See United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2006)(holding that the military judge did not abuse his discretion in finding that dismissal with prejudice was “the only remedy that addressed the rabid form of unlawful command influence placed before the court.”).

To fashion an appropriate remedy, the Commission must consider both the specific unlawful influence (inflammatory statements from political and military leadership throughout two Presidential administrations, culminating in capital charges before this commission), and the damage to the public perception of fairness. *See Lewis*, 63 M.J. at 416. In *United States v. Lewis*, the Court of Appeals for the Armed Forces determined that “the nature of the unlawful conduct ... combined with the unavailability of any other remedy that will eradicate the unlawful command influence and ensure the public perception of fairness in the military justice system”

compelled dismissal with prejudice. *Id.* In that case, the SJA and trial counsel engaged in an “orchestrated effort to unseat” the military judge and, but for this inappropriate “attack,” there existed no grounds for disqualification. *Id.* at 414. In reviewing the remedial measures taken at the trial level, the Court determined that assignment of a new judge from a different circuit and other remedial actions (disqualification of the SJA and assignment of a new CA for post-trial matters) did not cleanse the appearance of unlawful command influence. *Id.* at 415-416. The Court concluded that “from an objective standpoint, the Government has accomplished its desired end and suffered no detriment or sanction for its actions.” *Id.* at 416.

Similarly, there is no remedy available in the present case that can eradicate the actual or apparent unlawful influence exerted by the President of the United States and other political leadership. In fact, there could be no greater prejudicial and inflammatory impact in any case than the extraordinary facts presented here -- the President of the United States and other leadership, over a period of years, all across the United States, and in the full view and hearing of the global media, calling these co-accused names such as “terrorists,” “killers,” “extremists,” “radicals,” and the “enemy,” announcing they are guilty of the crimes charged, announcing they have confessed to the crimes charged, and repeatedly stating they will be brought to trial in the forum most likely to exact swift justice. The guilt of these men has been predetermined. The overwhelming evidence demonstrates that, over the course of two administrations, the Commander in Chief’s desire for conviction and retribution has been constant and unrelenting. It has saturated the public. Under these facts, it is impossible for any objective, disinterested observer, with knowledge of all facts and circumstances, to believe these men can receive a fair trial by military commission.

Let it also not be ignored that this is a capital case. If convicted of any of the capital counts, these men could be sentenced to death. Since this is to be a capital prosecution, exacting standards must be met to assure that it is fair. "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). Because "death is different," the Constitution requires that " 'extraordinary measures [be taken] to insure that the accused 'is afforded process that will guarantee, as much as is humanly possible, that [a sentence of death not be] imposed out of whim, passion, prejudice, or mistake.' " *Caldwell v. Mississippi*, 472 U.S. 320, 329 n.2 (1985); quoting *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1981) (O'Connor, J., concurring)). Indeed, "[t]ime and again the [Supreme] Court has condemned procedures in capital cases that might be completely acceptable in an ordinary case." *Caspari v. Bolden*, 510 U.S. 383, 393 (1994); quoting *Strickland v. Washington*, 466 U.S. 668, 704-705 (1984) (Brennan, J., concurring in part and dissenting in part)); see also *Kyles v. Whitley*, 514 U.S. 419, 422 (1995) (noting that the Court's "duty to search for constitutional error with painstaking care is never more exacting than in a capital case.")(citation omitted).

The Commission is duty-bound to ensure that the accused are afforded process that will guarantee them that a death sentence will not be imposed due to the passions and prejudices injected into the proceedings by the President of the United States, political appointees, or elected representatives. Under the present facts, because of the widespread pretrial publicity that has included unending prejudicial statements from the highest public officials in the U.S. government, Due Process cannot be achieved. No fair trial can result from these military commissions. The Commission has the duty to enter findings and dismiss the charges with



prejudice. Any remedy short of dismissal with prejudice will leave an "intolerable strain on public perception of the military justice system." *Wiesen*, 56 M.J. at 175.

7. **Request for Oral Argument:** The Defense requests oral argument to allow for thorough consideration of the issues raised by this motion. RMC 905(h) provides that either party may request an RMC 803 session to present oral argument or have evidence heard on a motion. Specifically, the defense requests to argue this motion during the hearing scheduled for 11-15 June 2012.


8. **Request for Witnesses and Evidence:**

- a. President Barack Obama
- b. President George W. Bush
- c. Vice-President Joseph Biden
- d. Senator Lindsay Graham
- e. Attorney General Eric Holder
- f. Mr. Jeh Johnson, General Counsel, Dept. of Defense
- g. VADML (ret.) Bruce MacDonald, Convening Authority, Military Commissions
- h. General Mark Martins, Chief Prosecutor, Military Commissions

9. **Certificate of Conference:** On May 11, 2012 Defense Counsel conferred with the prosecution regarding the Government's position on this motion. The Government opposes the motion.

10. Attachments:

a. Certificate of service



WALTER B. RUIZ  
CDR, JAGC, USN  
Defense Counsel

Detailed Learned Counsel for Mr. Hawsawi

//s//  
JAMES G. CONNELL, III  
Detailed Learned Counsel

Counsel for Mr. al Baluchi

//s//  
STERLING R. THOMAS  
Lt Col, USAF  
Defense Counsel

//s//  
JAMES P. HARRINGTON  
Learned Counsel

Counsel for Mr. bin al Shibh

//s//  
KEVIN BOGUCKI  
LCDR, USN  
Defense Counsel

**CERTIFICATE OF SERVICE**


I certify that on the 11<sup>th</sup> day of May, 2012, I electronically filed the **Joint Defense Motion to Dismiss for Unlawful Influence** with the Clerk of the Court and served the foregoing on all counsel of record by e-mail.

---

WALTER B. RUIZ  
CDR, JAGC, USN  
Defense Counsel

CERTIFICATE OF SERVICE

I certify that on the 11<sup>th</sup> day of May, 2012, I electronically filed the **Joint Defense Motion to Dismiss for Unlawful Influence** with the Clerk of the Court and served the foregoing on all counsel of record by e-mail.

  
\_\_\_\_\_  
WALTER B. RUIZ  
CDR, JAGC, USN  
Defense Counsel